

The Commission also complains that the Council has refused to adjust the correction coefficients which must be applied to the remuneration and pensions according to the different places of work or residence of the persons concerned. In the view of the applicant, it cannot be disputed that the 'decision' of the Council is entirely silent on that point, the reasoning underlying it referring exclusively to the 'exception clause' of Article 10 of Annex XI. The Council's attitude must therefore be regarded as an unlawful refusal to act.

⁽¹⁾ Council Decision 2011/866/EU of 19 December 2011 concerning the Commission's proposal for a Council Regulation adjusting with the effect from 1 July 2011 the remuneration and pension of the officials and other servants of the European Union and the correction coefficients applied thereto (OJ 2011 L 341, p. 54).

Reference for a preliminary ruling from the Högsta domstolen (Sweden) lodged on 30 April 2012 — Billerud Karlsborg Aktiebolag, Billerud Skärblacka Aktiebolag v Naturvårdsverket

(Case C-203/12)

(2012/C 184/12)

Language of the case: Swedish

Referring court

Högsta domstolen

Parties to the main proceedings

Applicants: 1. Billerud Karlsborg Aktiebolag, 2. Billerud Skärblacka Aktiebolag

Defendant: Naturvårdsverket

Questions referred

1. Does Article 16(3) and (4) of Directive 2003/87 ⁽¹⁾ mean that an operator who has not surrendered a sufficient number of emission allowances by 30 April must pay a penalty regardless of the cause of the omission, for example, where, although the operator had a sufficient number of emission allowances on 30 April, as a result of an oversight, an administrative error or a technical problem it did not surrender them then?

2. If Question 1 is answered in the affirmative, does Article 16(3) and (4) of Directive 2003/87 mean that the penalty will or may be waived or reduced for example in the circumstances described in Question 1?

⁽¹⁾ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, p. 32).

Appeal brought on 9 May 2012 by Grazer Wechselseitige Versicherung AG against the judgment of the General Court (Sixth Chamber) delivered on 28 February 2012 in Case T-282/08 Grazer Wechselseitige Versicherung AG v European Commission

(Case C-215/12 P)

(2012/C 184/13)

Language of the case: German

Parties

Appellant: Grazer Wechselseitige Versicherung AG (represented by: H. Wollmann, Rechtsanwalt)

Other party to the proceedings: European Commission

Form of order sought

1. Set aside the judgment under appeal;
2. give final judgment itself in the matter and annul Commission Decision 2008/719/EC of 30 April 2008 on State aid C 56/06 (ex NN 77/06) implemented by Austria for the privatisation of Bank Burgenland (OJ 2008 L 239, p. 32) and order the European Commission to pay the costs of the proceedings before the General Court and the Court of Justice;
3. in the alternative to the claim at point 2 above, refer the case back to the General Court and reserve costs.

Pleas in law and main arguments

The present appeal has been brought against the judgment of the General Court of 28 February 2012 in Case T-282/08 *Bank Burgenland*. The appellant challenges the General Court's decision in its entirety. According to the appellant, the judgment under appeal is vitiated by procedural errors as a result of which the appellant's interests were prejudiced. Moreover, the General Court infringed European Union law ('EU law') in several respects in its decision. The appellant submits the following grounds of appeal.

By its first ground of appeal, Grazer Wechselseitige Versicherung AG complains of an infringement of EU law. The General Court takes the view that the *Land* Burgenland ought not to have taken account in the privatisation process of the *Ausfallhaftung* (deficiency liability) of the *Land* Burgenland for Bank Burgenland's existing liabilities. Those considerations are wrong in law. The General Court misapplied the standard of a private-sector investor. The General Court fails to recognise that the deficiency liability of the *Land* Burgenland is an obligation assumed by the *Land* in its capacity as owner of the bank. In accordance with the case-law of the Court of Justice and the General Court's practice in other cases, such as *Ryanair*,⁽¹⁾ a liability assumed by a Member State in connection with an economic activity must be taken into account in the application of the private investor test. Furthermore the General Court's interpretation is incompatible with the practical effect of Community State aid rules. The principle postulated by the General Court that EU Member States may not ensure in relation to the privatisation of banks that the purchaser releases the Member State from existing State guarantees is likely to create significant obstacles to the task of overcoming the current financial and public debt crisis in Europe.

By its second ground of appeal, the appellant complains that the judgment under appeal is vitiated by a procedural error in so far as the General Court did not produce its own considerations in respect of an essential plea in law but made a blanket reference to the Commission's assertions. The Commission's assessment that the (alleged) defects in the conditions of the *Land's* tender procedure had no impact on the size of the offers made is erroneous. By adopting that erroneous legal assessment without giving it any consideration the General Court, moreover, itself infringed EU law. The General Court disregards the fact that defective tendering conditions could lead to bidders

making higher offers than in a tender procedure free of conditions. In the privatisation of Bank Burgenland, the unsuccessful consortium apparently offered an excessively high purchase price in order to compensate for the qualitative shortcomings of its own offer (the risk that, on a sale to the consortium, the deficiency liability would be invoked against the *Land*). If the General Court regards the qualitative criterion 'release from deficiency liability' as being unlawful under State aid rules, it should not have been able at the same time to accept that the consortium's offer gave a good proxy of Bank Burgenland's — aid-free — market price.

By its third ground of appeal, the appellant claims infringement of its right to be heard. The General Court failed to acknowledge an essential plea in law. It is undisputed as between the parties to the proceedings that, prior to completion of the privatisation, Bank Burgenland would have issued additional bonds in the amount of EUR 320 million on a sale to the consortium also. Those bonds would have had the benefit of the *Land's* deficiency liability. In that regard, the appellant explicitly stated in its application of 17 July 2008 that the consortium benefited from that measure to a considerably greater extent than the appellant. The Commission failed to take that into account in comparing the two offers. In the judgment under appeal, the General Court fails to address the plea in law concerned. Thus, the General Court failed to deal exhaustively with the appellant's pleas in law and deprived the Community judicature of the possibility of exercising the power of review conferred upon it.

(1) Case T-196/04 *Ryanair v Commission* [2008] ECR II-3643.